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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEE LANG,

Defendant and Appellant.

F063227

(Super. Ct. No. VCF203499)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari L. Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Kane, J., and Poochigian, J.

A jury convicted appellant, Kenneth Lee Lang, of assault by means of force likely to cause great bodily injury (count 1/Pen. Code, § 245, subd. (a)(1)),¹ battery with serious bodily injury (count 2/§ 243, subd. (d)), misdemeanor evading a police officer (count 3/§ 2800.1, subd. (a)), resisting arrest (count 4/§ 148, subd. (a)), and driving with a suspended license with priors (count 5/Veh. Code, § 14601.1, subd. (a)). The jury also found true a great bodily injury enhancement (§ 12022.7, subd. (a)) in count 1. In a separate proceeding, the court found true an on-bail enhancement (§ 12022.1) and allegations that Lang had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)).

On March 24, 2009, the court sentenced Lang to prison for an aggregate term of nine years: the middle term of three years on Lang's assault conviction, doubled to six years because of his prior strike conviction, a three-year great bodily injury enhancement, a stayed six-year term on his battery conviction, and concurrent 90-day terms on counts 3 and 4 that were deemed served. The court also dismissed count 5, and stayed the two-year on-bail enhancement pending sentencing on any felony in case No. VCF148768.

Following a timely appeal, on August 10, 2010, this court, in pertinent part, held that Lang's juvenile adjudication for attempted robbery did not qualify as a prior strike conviction within the meaning of the three strikes law and that section 654 prohibited the court from imposing punishment on both his evading a police officer conviction and his resisting arrest conviction. We remanded the matter for resentencing.

On July 13, 2011, the trial court resentenced Lang to an aggregate seven-year term.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

On this appeal, Lang contends that: 1) the court erred in imposing the aggravated term on Lang's assault conviction; 2) the minute order of his sentencing must be amended to conform to the court's oral pronouncement of judgment; and 3) the court erred by its failure to memorialize the 842 days he spent in postsentence custody in section 14 of his abstract of judgment. We will find merit to Lang's second contention and partial merit to his third contention. We will also direct the trial court to issue an amended sentencing hearing minute order and an abstract of judgment that are consistent with this opinion. In all other respects, we affirm.

FACTS

The Underlying Offense

On April 21, 2008, after finding John Apodaca at Andrea Jackson's apartment, Lang punched him in the head causing Apodaca to fall down. Apodaca left the apartment and walked home. The following day, however, he was transported to the hospital by ambulance after complaining of pain in his head and in his ribs. Apodaca was in the hospital three weeks, underwent two brain surgeries, and was left permanently disabled.

On April 30, 2008, a Tulare police officer attempted to pull Lang over after discovering that the car he was driving had a license plate belonging to a different vehicle. Lang fled but was eventually arrested after leading several officers on an 18-mile pursuit.

Lang's Resentencing Hearing

On July 13, 2011, the trial court struck the on-bail enhancement pursuant to a plea bargain in an unrelated case and it dismissed Lang's driving with a suspended license conviction. It also resentenced Lang to an aggregate term of seven years: the upper term of four years on Lang's assault conviction, a three-year great bodily injury enhancement, a stayed aggravated four-year term on Lang's battery conviction, 90 days with credit for time served on Lang's evading a police officer conviction, and a stayed 90-day term on

his resisting arrest conviction. The court awarded Lang 317 days of presentence actual custody credit, 47 days of presentence conduct credit and 841 days of postsentence actual custody credit for the days he spent in custody from the date of his original sentencing on March 24, 2009, through the date of his resentencing on July 13, 2011.

In explaining its sentencing choices, the court stated:

“I have selected the aggravated term because of the fact that the defendant engaged in violent conduct. His actions documented he was a serious danger to others. He has a lengthy criminal record. And his prior performance on both probation and parole were unsatisfactory. And in fact, there were no mitigating factors. I’m not precluded from imposing that at this time, despite the fact that I selected the mid-term before.

“The reason I selected the mid-term before [for Lang’s assault conviction] was two reasons. One, that it was going to be doubled because of the strike. And I had imposed the two-year consecutive enhancement. And I felt that using an aggravated double [term] plus the enhancement was too much for this offense. So I toned it back for that.

“Now, I am extremely, extremely reluctantly going to strike the two-year enhancement only because of the circumstances here. So that is count -- that’s an enhancement under 12021 [subdivision] (b). I am striking that. But I’m not liking the fact that I’m having to strike it.”

DISCUSSION

The Aggravated Term Imposed on Lang’s Assault Conviction

Section 1170 subdivision (b) in pertinent part provides that “the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (See also, Cal. Rules of Court, rule 4.420(c).) Lang contends the court violated section 1170, subdivision (b) when it relied on his violent conduct to impose an upper term on his assault conviction because it also imposed a great bodily injury enhancement on that count. He further contends that except for the serious injury that resulted from his assault offense, it was akin to a simple battery and at his original sentencing the court imposed only the middle term on that conviction. Thus,

according to Lang, the court's error was prejudicial because it is reasonably probable the court would have imposed the middle term had it not relied on one improper circumstance. We will find that, even assuming the court erred as Lang contends, the error was harmless.

“The mere fact a trial court erroneously relies upon certain factors in imposing an upper term does not per se require reversal. Reversal is only required where there is a reasonable probability the trial court would sentence the defendant differently absent the erroneous factors. [Citation.] Thus, where the trial court has stated several factors warranting the upper term, and only some of those factors are erroneous, the sentence is generally affirmed. [Citations.] Indeed, even one valid factor is sufficient to justify the upper term. [Citations.]” (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319.)

In addition to the challenged circumstance, the court cited Lang's lengthy prior record (Cal. Rules of Court, rule 4.421(b)(2)) and his prior poor performance on probation and parole as reasons for imposing the aggravated term (Cal. Rules of Court, rule 4.421(b)(5)). Lang does not address these circumstances and the record supports the court's reliance on them to impose the aggravated term.² Further, even though at Lang's original sentencing hearing the court imposed the middle term on his assault conviction, its comments quoted above indicate that it did so only because it felt that the aggregate nine-year term it originally imposed was sufficient to punish Lang for the underlying conduct in this matter. However, upon resentencing, Lang was no longer subject to a doubling of his sentence because his juvenile adjudication for attempted robbery did not qualify as a prior conviction within the meaning of the three strikes law, the court

² The probation report that was prepared for Lang's resentencing hearing indicates that as a juvenile, from 1986 to 1988 Lang was adjudicated for three offenses including misdemeanor sexual battery and attempted robbery. He also violated his juvenile probation three times. As an adult, from 1991 through 2008 he was convicted of six felonies and six misdemeanors, many of which he committed while he was on probation, and he violated his parole once.

reluctantly struck the on-bail enhancement, and even with an aggravated term on the assault conviction, the court sentenced Lang to *only* seven years. Moreover, Lang's attempt to minimize the seriousness of his assault offense by noting that it involved only a single blow ignores the consequences of that blow which resulted in the victim requiring two surgeries and becoming permanently disabled. These circumstances make it extremely unlikely the court would have imposed the middle term on Lang's assault conviction even if it had not considered the challenged circumstance. Thus, we conclude that even if the court erred as Lang contends, the error was harmless.

Lang's Sentencing Hearing Minute Order

Although in his opening brief Lang contends the court erred by its failure to stay the term it imposed on his resisting arrest conviction, in his reply brief Lang appears to concede that the court stayed this term during its oral pronouncement of judgment. However, he contends that the minute order of his resentencing hearing must be corrected to reflect the court's oral pronouncement of judgment.³ We agree that the court stayed the term at issue when it resentenced Lang and that the minute order of Lang's resentencing hearing must be amended to conform to the court's oral pronouncement of judgment.

“‘Rendition of judgment is an oral pronouncement.’ Entering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling. ‘The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms [citation] it cannot add to or modify the judgment which it purports to digest or summarize.’ [Citation.]”
(*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

³ In making these arguments, Lang erroneously states that he was convicted of resisting arrest in count 3 and of evading a police officer in count 4.

Since the oral pronouncement of judgment is controlling, we will direct the trial court to issue an amended minute order for Lang's resentencing hearing which correctly indicates that the court stayed the term it imposed on Lang's resisting arrest conviction.

The Credit Issue

In his opening brief Lang contends the court erred by its failure to calculate the days he spent in postsentence actual custody. In his reply brief Lang acknowledges that the court memorialized his postsentence actual custody credit in section 11 of his abstract of judgment. However, he contends the court erred by not memorializing the 842 days he spent in postsentence actual custody in section 14 of the abstract. Although we agree that the court should have memorialized Lang's postsentence actual custody credit in section 14 of his abstract of judgment, by our calculations, Lang was entitled to only 841 days of postsentence custody credit.⁴

“Defendants sentenced to prison for criminal conduct are entitled to credit against their terms for all actual days of presentence and postsentence custody (Pen. Code, §§ 2900, subd. (c), 2900.5, subds. (a), (b))’ [Citation.] However, there are ‘separate and independent credit schemes for presentence and postsentence custody.’ [Citation.]

“For custody ‘prior to the imposition of sentence,’ persons detained in a county jail, or other equivalent specified local facility, may be eligible to receive, in addition to actual time credits under section 2900.5, presentence good behavior/worktime credits of up to two days for every four days of actual custody. (§ 4019, subds. (a)(4), (b), (c), (e), (f).) “[T]he court imposing a sentence” has [the] responsibility to calculate the exact number of days the defendant has been in custody “prior to sentencing,” add applicable good behavior credits earned pursuant to

⁴ From March 25, 2009, the day after he was originally sentenced, through March 24, 2011, Lang served two years in custody or 730 days (365 days + 365 days = 730 days). From March 25, 2011, through July 13, 2011, he served 7 days in custody in March, 30 days in April, 31 days in May, 30 days in June, and 13 days in July. Thus, Lang served a total of 841 days in postsentence custody (730 days + 7 days + 30 days + 31 days + 30 days + 13 days = 841 days).

section 4019, and reflect the total in the abstract of judgment. (§ 2900.5, subd. (d); see also [§ 2900.5] subd. (a).)’ [Citation.]

“Once a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration. Such credits can be earned, if at all, only for time served “in the custody of the Director” (§ 2933, subd. (a)) and pursuant to article 2.5 of chapter 7 of title 1 of part 3 of the Penal Code (commencing with section 2930) (hereafter article 2.5). Under article 2.5, eligible prisoners may shorten their determinate terms ... by up to six months for every six months actually served by performing, or making themselves available for participation, in work, training or education programs established by the Director. (§ 2933.) Such prison worktime credits, once earned, may be forfeited for prison disciplinary violations and, in some cases, restored after a period of good behavior. (§§ 2932, 2933, subds. (b), (c).) Accrual, forfeiture, and restoration of prison worktime credits are pursuant to procedures established and administered by the Director. (§§ 2932, subd. (c), 2933, subd. (c).)’ [Citation.]

“The sentence-credit statutes make only one express reference to a sentence modified while in progress,’ and that reference is found in section 2900.1. [Citation.] Section 2900.1 provides that ‘[w]here a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.’ The sentencing court must determine such time and reflect it in the abstract of judgment. (§ 2900.5, subds. (a), (d).)” (*People v. Saibu* (2011) 191 Cal.App.4th 1005, 1011-1013, quoting from *People v. Buckhalter* (2001) 26 Cal.4th 20.)

Section 11 of Lang’s abstract of judgment provides a place for the court to memorialize “[o]ther order[s].” The trial court listed certain information in section 11 including the 841 days Lang was in actual custody from March 25, 2009, the day after his original sentencing hearing, through July 13, 2011, the day he was resentenced. However, section 14 of Lang’s abstract of judgment is entitled “Credit for Time Served” (original all in capital letters) and that section includes a box entitled “Time Served in State Institution[.]” Therefore, since Lang’s abstract of judgment has a specific location

for memorializing Lang's postsentence actual custody credit, the court should have memorialized this credit in the above noted box of section 14.

DISPOSITION

The trial court is directed to prepare an amended minute order for Lang's resentencing hearing which indicates that the sentence imposed on Lang's conviction for resisting arrest was stayed. It is further directed to issue an amended abstract of judgment that in the appropriate part of section 14 memorializes the 841 days Lang spent in postsentence actual custody and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.